CONTROL OF GOVERNMENTAL ACTION TO PREVENT THE VIOLATION OF INDIVIDUAL RIGHTS

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Control of governmental action with a view to insuring governmental respects for individual rights is a problem which has preoccupied citizens, legislators, and lawyers of all times.

This problem is, indeed, fundamental for the state from both a theoretical and a purely practical point of view; on its solution, the democratic or non-democratic character depends. Democracy cannot be conceived without an organization destined to effectively protect the citizens from the possible abuses of public power. First of all, this protection is indispensable for the assurance of the citizen's personality. It is necessary for him to remain a man in order that he may not become simply a robot in the hands of the authority.

But such a problem is not simple, for it consists, in reality, of reconciling the respect for the legitimate rights of individuals with the equally legitimate prerogatives that a state must possess in order to satisfactorily carry out the tasks of general interest which are incumbent upon it. Harmony must be achieved between these rights on the one hand, these prerogatives on the other.

For a question both as important and as delicate as this, it was inevitable that various solutions would have been adopted depending upon the countries, and depending even upon the state.

The most normal solution is that which consists of confiding to ordinary tribunals the task of protecting individual rights; it is still used by countries based upon common law such as Great Britain and the United States. It is not without disadvantages.

Indeed, if the protection of individuals is really effective, this approach threatens to lead to the tribunals' opposition to the authority of the state. This was the case in France of the *"Parlements"* before 1789.

On the other hand, this solution can lead the state, in order to safeguard its prerogatives, to limit excessively the powers of the tribunals, and even the cases in which they may intervene. In fact, in the common law countries, the regular court, which in matters of private law and penal law, are models of independence and scientific law, have very reduced powers over administrative agencies and thereby escape practically all control.

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Such a situation is not grave when the state, burdened only with a small number of clearly defined tasks (as was still the case in the beginning of the 20th century), has available to this end a restricted body of perfectly competent functionaries. It becomes more serious when the state intervenes in more and more areas, notably in the economic or social domain, as it has tended to do in our day. Governmental regulations become multiplied and the citizens are constantly involved with some public service in one form or another, whether they wish it or not. On the other hand, although the number of functionaries may increase, the same is not true of their quality. The result is ever more numerous frictions between adminstrators and those administered, ever more numerous assaults on the rights of the latter.

In order to remedy the situation, special bodies are created in order to regulate the disputes which can arise between a public service and its users. But these bodies, of a badly defined character, do not offer the guarantees which the courts do, and their multiplications with varied organizations results in great complications.

The example of Great Britain, in this respect, is striking. L. N. Brown[1] estimated the number of particular administrative courts which were submitted only to a very limited control of judicial review to be 2076. A law effective August 1, 1958, succeeded in restoring order to this organization. It constituted a first step toward a unification of the status of these administrative courts that had arisen partly as a consequence of the insufficiency of the control that the courts of common law are competent to exercise on the administration, and partly from the necessity of assuring citizens, in spite of all, some protection against this. But there is still no sufficient recourse against the decisions taken by the authorities or the administrative commissions.

A second solution, at the opposite pole from the preceding one, is that adopted by the countries with a socialist regime. It consists of multiplying the administrative controls being exercised officially by organs elected by the people and of following particularly detailed procedure in order to assure respect for the rights of the administered. However, the guarantees given by such controls cannot be compared to those offered by the control of an independent jurisdictional organism composed of qualified lawyers, at least when it concerns questions of legality. This point of view has not escaped several interested states which have already created (like Yugoslovia) or are thinking of creating (like Poland) an administrative court.

[1] L. N. Brown, The Administrative Court in Great Britain, in "Studies and Documents" 201 (1959).

The third solution is mixed. It consists of confiding to a specialized administrative judge control of the administration. It was adopted long ago by numerous European countries: Germany, France, Greece, Italy, Turkey. It has rapidly exceeded this framework and has been, in our time, adopted by the major part of the new States of Africa and in Asia, by Cambodia. A country like Belgium, which has been faithful since its creation to the unity of jurisdiction, has seen the necessity of organizing an administrative jurisdiction which it established by a law effective December 23, 1946.

The advantage of this solution is that it offers a competent administrative judge, that is to say, a judge who will be in position to evaluate the importance of the individual rights of the citizens, but who will be at the same time, conscious of the necessity of leaving to public power the prerogatives useful to the accomplishment of its mission of general interest. Such a judge will know how to establish a just equilibrium between those rights, on the one hand, and those prerogatives on the other.

We are referred to a personage independent by principle, therefore, offering all guarantees to the individuals. The administrative judge is cognizant of public questions, conscious of the difficulties encountered by the public services and of the limitations imposed on them. The administration is thus in no way opposed to the control exercised by such a judge; that is why it is only in countries where an administrative jurisdiction exists that a complete and effective control over the administration can exist.

Although this third solution has its advantages, it also presents its disadvantages. On the one hand, it is difficult to recruit judges who, while perfectly aware of the organization and the function of the administration, are completely independent of it. At the same time, existence of a second order of jurisdiction creates complications, notably in attempting to fix the respective competencies of the ordinary courts and of the administrative courts. Such disadvantages are not negligible. But it is still true that only an administrative jurisdiction is apt to exercise the general control necessary to make the administration respect the rights and liberties of the citizens.

A study of how this control is exercised by the French administrative judge will be helpful since France is the first country where there has been created and developed an administrative jurisdiction, and because its organization has served as a model to most of the states which have, as a consequence, adopted the solution of the duality of the orders of jurisdiction.

The technique is simple. It consists of the possibility for every interested citizen to appear before the administrative jurisdiction to

contest any act emanating from any administrative authority, a recourse aimed at having this act annuled for illegality. It is this appeal from the excess of power which we shall first examine together with the means used in its support.

The Conditions of Admissibility of the Appeal from Excess of Power

These conditions are three in number; they have reference to:

(1) the nature of the attacked act;
(2) the qualifications of the petitioner; and
(3) the forms and required delays.

The appeal from excess of power is only possible against acts emanating from an administrative authority. It is, therefore, not operable against legislative acts nor against acts emanating from a judicial authority. Thus, not only judgments and decrees of the diverse courts and tribunals, but also acts of the police acting as an auxiliary of repressive justice are excluded from appeal.

However, the appeal is available against acts of all the administrative authorities: President of the Republic, Prime Minister, ministers, prefects, mayors, commissions, and other organizations whether their acts are individual or official. This appeal also permits the attack upon "decree-laws", that is to say, acts of the executive power taken in matters normally arising within the domain of the law (by virtue of an express obligation of the legislator) which have been delegated to the executive.

As to the qualifications of the petitioner, the petition from excess of power can be exercised against an administrative act by any person having an interest in the annulment of this act. The Council of State has always interpreted rather broadly the notion of "interest" giving qualification in order to introduce the appeal.

Thus, individuals have an interest in protecting themselves against any act injurious to them in the exercise of their individual callings: a businessman may attack an act controlling his business, notably if this act interferes with the freedom of the business; a landlord is within his rights to protect himself against an act regulating the right of property; the user of a subway line can contest the legality of an order raising the transport rates. A simple moral interest can suffice: the ministers of religious cults and their congregations have qualifications to challenge for excess of power administrative measures which they deem contrary to the freedom of conscience or the freedom of the religious cults. Local government taxpayers may raise complaints against financial or fiscal decisions made by the representatives of such local government. State employees have an interest in attacking all the acts which are injurious to their status or personal situation.

Groups, such as associations or unions, are permitted to introduce an appeal from excess of power against acts injurious to the collective interests which it is their aim to defend.

The appeal for excess of power is not subject to any determined form; notably it does not need to be presented by a lawyer. Furthermore, it is without cost. If the appeal is rejected, the petitioner must pay only a fiscal charge of about 50 new francs. The informal and gratuitous nature of the appeal constitutes one of its most remarkable traits.

On the other hand, the appeal from excess of power is admissible only within a period of two months from the publication in the Official Journal of the challenged regulation, or from personal notification to the interested party if an individual act is involved. The brevity of this period is due to the necessity of not allowing the fate of an administrative act to remain in suspense for a long time. After this passage of time, even the illegal act becomes legal.

The Means that One May Employ in an Appeal from Excess of Power

The appeal from excess of power seeks to obtain the annulment of an administrative act on the ground that it is illegal. The arguments that can be invoked in support of such appeal can, therefore, be only arguments to the exclusion of all argument as to the appropriateness of the administrative action undertaken. While the judge must watch that the administration acts according to the law, he must not substitute himself for it or involve himself in its functioning. He cannot try to determine if a given official should have acted or not, or if he ought to have acted according to any restrictions. Having neither the means nor the elements for evaluations of this nature, nor having, in addition, the responsibility for the action, he would risk being injurious to the normal course of public services if he attempted to exercise a control on the facts or on the appropriateness of the acts.

It is because the administrative judge has been perfectly conscious of the necessity of distinguishing clearly between the domain of legality (which is his), and that of appropriateness, (which is that of the active administrator), that administrative jurisdiction has been able to develop without impediment and do useful work. Thus, confined to the examination of legality, the role of the judge is, nonetheless, very important and his control very effective and very powerful.

The appeal for excess of power, thus precise in its object, traditionally involves four possible grounds:

(1) Incompetence,
(2) Vice of form (incorrect form),

(3) Violation of the rule of law,
(4) Misuse of power.

Incompetence. This ground permits the annulment of an administrative act made by an authority who had no qualifications, according to the law, to make it.

Incompetence can result either from an encroachment of an authority in the sphere of activity reserved for another authority (*e.g.*, a requisition is made by a mayor when it should have been made by the perfect), or from the encroachment of an inferior authority on the powers of a superior authority (*e.g.*, when a minister makes a decree in a case when a government decree was necessary) or equally, from the encroachment of a superior authority on the powers of a subordinate authority (*e.g.*, when a minister issues a decree in a matter when the power of regulating belongs to the perfect).

One must also cite "negative incompetence," which exists when an administrative authority refuses to make a decision for the erroneous motive that it is not competent. Hypothetically, this would occur when a minister claims that the power of decision belongs to a commission organized in his ministry, when in reality this commission has only a consulting role.

Incorrect form. Incorrect form consists in the ommission or in the incomplete or irregular adherence to the administrative formalities provided for by the laws and the rules.

Very often a hearing is conducted to collect certain information. Procedural safeguards are guaranteed. The observation of such formalities constitutes a guarantee for the benefit of the administered. It avoids hasty decisions which are often badly studied or erroneous. It is important therefore that it be sanctioned.

According to a long line of cases, incorrect form entails the annulment of the act which is besmirched by it only if the formality that is omitted, or irregularly accomplished, is substantial, *i.e.*, if the omission or irregularity has affected the challenged decision. For example, the act of condemning private land for public use by an administrative body must be preceded by an inquest of a duration of two weeks at the Town Hall. Such inquest, according to the regulation, must be announced in a certain number of local newspapers, and the announcement must be printed in the newspapers "in huge characters." It will be annuled if the inquest has not been published in the press, or if it has not taken place within two weeks, but not if the publication has taken place without being printed in large letters, for this last incorrect form is not judged as substantial.

Violation of the rule of law. This ground is by far the most important. Two elements must be considered: the nature of the objection and how the judge exercises his control.

The violation of the rule of law can, in the first place, result from the violation of the law and of regulations. This violation consists, first of all, of the open violation of a legislative or regulatory text. A false interpretation of the latter more frequently accounts for the violation. Finally, a false application with regard to the facts may be the grounds for objection. A false interpretation is an error of law. A false application is an error of fact. The latter occurs when a competent authority acts "on the request of the interested party," as authorized by law, but when in reality no such request has ever been made.

The violation of the rule of law can, in the second place, come out of the violation of a general principle of law. Here is one of the most audacious and most important theories of French administrative law.

The Council of State believes that, outside of the written laws, French public law is equally founded upon unwritten rules of law that have legislative value. Consequently, they are imposed upon the executive power and upon administrative authorities in so far as they are not contradicted by a positive statute. This theory is entirely founded upon the desire to fully assure the safeguarding of the individual rights of the citizens. As soon as he believes that a rule is indispensable to assure this safeguard, the administrative judge establishes it as a general principle of law to which he confers legislative value, and the violation of this principle is tantamount to violation of the law.

Among these general principles, we shall mention essentially that of liberty and that of equality. The principle of liberty is recognized, in certain of its forms, by legislation (for example, the freedom of business, the freedom of association, the freedom of assembly), but it is applied in an absolutely general manner by the administrative judge, who has thus established the freedom of coming and going, the freedom of conscience, and the right of the individual regarding his own person, which were not formulated in the written laws in a precise manner.

It is the same for the principle of equality: the Council of State recognizes the equality of all the citizens, whatever be their race or their religion; the equality of all the citizens before taxation; the equality of all the citizens before services; the equality of the sacrifices having to be asked of the citizens or of a group of citizens placed in the same situation. This last principle has permitted the development of extensive case law involving the responsibility of the public bodies toward the citizens.

Let us cite again the principle "*audi alteram partem*" (fair hearing for both parties of a controversy), applied only in certain cases by positive texts, but in an absolutely general manner by the adminis-

trative judge; and the principle that administrative acts cannot have retroactive effect.

Thirdly, the violation of the rule of law can consist of a violation of a decision by an administrative or judicial tribunal. If, for example, the administrative authority reasserts a police rule annuled by the judge as illegal, this second rule will be annuled as being contrary to the previous decision.

The extent of the powers of control exercised by the administrative judge varies according to the extent of the powers conferred by law upon administrative authority. If, in a given case, the law confers on a competent authority powers without limitations, the judge can only inquire whether the decision taken does not contain an open violation of the law and of the rules, or a false interpretation of the latter, or if it is not founded upon an error of fact.

If, on the contrary, the law subordinates the exercise of administrative powers to a precise condition, the judge must verify if this condition has been complied with, whatever be the investigations that he must make in order to proceed with this verification. It is the same if these investigations lead him to examine the facts, for in this hypothesis the control of the facts is necessary to control legality.

Thus, the Judge must determine not only whether the motives of the author of the attacked act are materially exact, but also if, with regard to the condition posed by the law, they could validly be invoked. For example, a mayor can, by virtue of article 97 of the law of April 5, 1884, issue in his municipality police decrees in the interest of tranquility, of health and of public order. The judge, on appeal from such decree must verify if this decree has as its object the assurance of tranquility, health, or public order. This verification will lead him almost always to an examination of the facts. For example, a decree forbidding a public meeting is legal, when freedom of assembly exists legally, only if the projected meeting is apt to disturb public order; consequently, the judge must determine what threats, due to this manifestation, menace general tranquility, and whether or not the mayor has available police forces sufficient to ward off these threats. The judge thus exercises a complete control on the measure taken; the guarantee given to the citizens is total.

In the same way, a mayor can only validly regulate the traffic of vehicles (traffic, in principle, is free according to the law) in his municipality if this traffic is dangerous. The administrative judge will ascertain, consequently, whether the regulated roadway is narrow, whether it is used by numerous automobiles, whether it is crossed by other roads in the agglomeration.

Similarly, during the duration of the last war, an enactment had authorized the prefects to issue decrees in order to confine, administra-

tively, individuals dangerous for public security or national defense. Challenged by an appeal against a prefectoral decision pronouncing such a confinement, the administrative judge determined whether the person who was the object of this measure could be regarded as dangerous for public security or national defense. On this basis, a decree which confined a businessman who was dealing on the black market was annulled.

But how can the administrative judge materially exercise his control? Administrative acts do not need to be motivated; this principle means that the lack of motives in an act does not constitute an error of form, but it does not mean that the administration is not required to make the judge aware of the motives which have caused it to act. On the contrary, the judge who is in control of procedure is always free to demand that the administrative authority inform him of the reasons supporting the enforcement of the attacked act. If the authority refuses to comply with this demand, the judge will consider as established the allegations of the plaintiff which will almost always lead to the annulment of the act.

The sanction of refusal is severe; and, therefore, it is only in exceptional cases that the administration does not agree to explain its motives before the administrative court. Admittedly, the authorities could be tempted not to give their true motives and, thus, to deceive the tribunal. This risk is not great, however, for the procedure is adversary and the plaintiff is always allowed to question the defense of the administration and permitted to demonstrate, by all means of proof, its inexactness.

Misuse of power. This is a ground of subjective nature used as a basis for an objective appeal against the illegality of an act. There is a misuse of power when the competent authority makes a decision without committing either procedural violation of the rule of law, but, in order to reach its decision, has directed his powers toward an objective other than that contemplated when the powers had been conferred.

Thus, a mayor commits a misuse of power if he forbids a musical society to play on a public road, not in order to guarantee the comfort and security of traffic, but to favor another society of the same type composed of political friends; or, if he is personally organizing a dance, regulates dances not to assure public order, but to combat any competition.

A prefect commits a misuse of power if he requisitions a lodging for the benefit of the tenant in order to indirectly resolve private litigation in which the tenant opposes the landlord.

A mayor forbids traffic on a village street in order to have the village avoid repairing it; he is thus using his police power not to

assure public security, but to have the village save money. It is a misuse of power based on financial village considerations.

The misuse of power is a very precious ground, for it permits the annulment of acts which have every appearance of legality. But it is difficult to prove, and it imposes upon the judge subjective examination since it obliges him to determine, with sufficient precision, what has been the real intention of the author in the attacked act. Also, the judge examines the misuse of power as a last resort, that is to say, when he has recognized that there is no basis for other grounds; he views the ground of misuse with circumspection. However, misuse of power plays an interesting role because it permits the assurance of administrative morality even more than legality.

Related to the misuse of power is the misuse of procedure, which, for the administration, consists of using a procedure in a case where it is not applicable in order to avoid the use of the correct procedure which would be more complicated or more protective of individual rights and less advantageous for public power.

The Council of State has very recently issued an annulment due to misuse of procedure in the following case: The government has two means available for the seizure of newspapers: (1) It can use its administrative police powers which enable it to decree a seizure on preventive grounds in order to avoid an eventual disturbance of public order. This procedure is full of risks for the government because freedom of the press is a fundamental liberty guaranteed by the law, and in only very exceptional cases will the administrative judge permit a seizure on this basis. And on the other hand, if the seizure is illegal, he will condemn the State to pay the newspaper an indemnity equal to the loss suffered due to this irregular measure.

(2) Alternatively, the government can use the exceptional power granted to prefects by article 10 of the code of criminal procedure which permits them to take all necessary measures in the case of an attack on the safety of the state. In this hypothesis, the prefect must immediately inform the courts in order that a penal inquiry can be opened concerning danger to the safety of the state. The administrative jurisdiction is, therefore, not competent.

But what will happen then? If the court decides that the crime of attack on the safety of a state has not been established, it will terminate the penal inquiry by declaring that there are no grounds for prosecution. This will be final because the courts have no power to determine the responsibility of the state in the absence of statutory direction.

It can be seen, in these circumstances, that the government prefers to utilize the aforementioned procedure of article 10 which is absolutely without risk even if the measure taken has no justification.

In a decision made in June, 1960, the Council of State thus annuled a seizure of newspapers carried out by virtue of article 10 of the code of criminal procedure on the grounds that this seizure had been carried out in reality, not because of an attack on the security of the state, but as a preventative police measure and that, consequently, it could not be based on article 10.

CONCLUSION

In concluding this study we can affirm the simplicity and efficiency of the system based on the existence of an administrative jurisdiction to protect citizens against violation of their individual rights by the government. Its superiority is in this respect uncontestable. Experience has proven everywhere that judicial tribunals were extremely timid where they had to judge acts of the administration, and where they exercised only a reduced control. It is this timidity which led, for example, to the creation of a Council of State in Belgium in 1946. Moreover, an administration is wary of judges who are trained in private law and may forget that public services function in the general interest, and that, consequently, they must enjoy certain prerogatives not given to private individuals. Only an administrative judge is qualified to establish a just balance between the special rights that must belong to the state and the legitimate rights of the citizens; to arbitrate, for example, between the police powers that devolve upon administrative authorities for the maintenance of public order, and the individual liberties that are the basis of a democracy.

On the other hand, the criticism often made that administrative jurisdiction involves conflicts of competence with ordinary courts of law has no relevance as to the appeal for the annulment of administrative acts (the domain of which is exclusive), and cannot be confused with any other.

Finally, the idea, deeply rooted in democratic countries and particularly in France that totally independent judicial tribunals are the best protectors of individual liberty, is perfectly correct when it is a matter of protecting the citizen on the penal level which has historically been by far the most important. It is not correct when the problem is to protect this same citizen against the actions of administrative authorities. This problem, formerly of a minor interest, has become very acute in our time when freedom is more and more threatened by the invasion of administration in all domain. The judicial tribunals are not suitable for facing it. Only the existence of the appeal for annulment of administrative decision can really force all executive authorities to respect the law in their relations with individuals.